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No. 96-1607

In The

Supreme Court of the United States

October Term, 1996

DUWAMISH INDIAN TRIBE, SNOHOMISH INDIAN TRIBE and STEILACOOM INDIAN TRIBE,

Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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Petitioners, the Duwamish, Snohomish, and Steilacoom Indian Tribes (the "Three Tribes"), respectfully submit this reply brief in support of their Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit ("Petition").

INTRODUCTION

In their Petition, the Three Tribes offered compelling reasons for the issuance of a writ of certiorari in this case.[1] Two briefs in opposition have been filed, one by the United States and one by certain tribal respondents.[2] As discussed below, neither does anything to diminish the importance of the question presented by the Three Tribes.

FURTHER REASONS FOR GRANTING THE WRIT

I.

THE BRIEF IN OPPOSITION BY THE UNITED STATES MISCHARACTERIZES THE DECISION BELOW IN AN EFFORT TO AVOID REVIEW BY THIS COURT.

The Three Tribes have asked the Court to decide whether a

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1. Among other things, the Three Tribes demonstrated that the opinion below defies this Court's important prior rulings on a litigant's fundamental due process right to a fair trial (Pet. 11-14), conflicts with this Court's prior rulings on the importance of Rule 60(b)(6) of the Federal Rules of Civil Procedure as a means of effectuating that right (*Id.* at 14-16), and disregards this Court's prior rulings on the crucial role played by a district court judge as a trier of fact (*Id.* at 16-18).

2. A brief in opposition was filed collectively by the Tulalip Tribes, Muckelshoot Tribe, Nisqually Tribe, Puyallup Tribe and Squaxin Island Tribe (hereinafter "Tribal Respondents").

civil litigant is entitled to post-judgment discovery[3] and other relief under Rule 60(b)(6) of the Federal Rules of Civil Procedure when it learns, after a judgment has been entered, that the trial judge may well have been mentally incompetent at the time he issued his opinion. Pet. i. In response, the United States asserts that "the decision below does not implicate important due process concerns warranting review by this Court." U.S. Opp. 10. The United States is mistaken.

The panel majority proffered two reasons for denying the Three Tribes' Rule 60(b)(6) motion. First, it stated that "This is not one of those rare cases where 'extraordinary circumstances' warrant vacating an 'erroneous judgment.' " Pet. App. 11a. Second, it ruled that the Three Tribes suffered no harm because, regardless of whether the district court judge was mentally competent at the time he rendered his opinion, a magistrate judge and the court of appeals "closely examined the case and reached the same conclusion" as the judge. To conclude, as does the United States, that this reasoning "does not present any conflict with the due process right that petitioners derive from this Court's jurisprudence," U.S. Opp. 11, is incorrect.

With regard to the existence of "extraordinary circumstances," the panel majority raised the bar so high that no one can enforce the right to a competent trier of fact. To the extent the panel majority stated that the Three Tribes have not set forth facts sufficient to justify further discovery, it is clear that no party can. Pet. App. 17a-18a ("If disability were a proper

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3. Contrary to the assertions of the United States (U.S. Opp. 6, 8), the Three Tribes do not seek to vacate the judgment at this time. Instead, the Three Tribes have made clear to the district court (Pet. App. 24a), the court of appeals (Pet. App. 11a), and this Court (Pet. 11), that they seek to take *discovery* to determine if there is further factual support for their due process claim. The Three Tribes will only seek to vacate the judgment if subsequent discovery reveals a sufficient factual basis to justify such relief.

basis for setting aside the judgment, *I can see no basis for denying the [Three] Tribes the right to seek discovery* from the judge's doctors to confirm or refute speculation about the judge's competence.") (Kozinski, J., concurring) (emphasis added). By denying the Three Tribes the ability to discover facts relating to a judge's competence when there is substantial evidence putting that question in issue, the panel majority effectively denied the existence of any right under the due process clause, and its attempt to reserve the question for a later day, Pet. App. 12a, is meaningless. As a result, the question presented is before the Court.

Likewise, with regard to the fact the magistrate judge and the court of appeals reached the same conclusion as the judge, the majority did not, as the United States suggests, assume the right to a competent trier of fact; it has refused to recognize it. Here, the district court judge did not accept the magistrate's report at a time when he was competent, and he ordered a *de novo* evidentiary hearing. Thus, the magistrate's report cannot be viewed as a substitute for review by a competent judge. Review by the court of appeals, especially when the standard is "clearly erroneous," is no substitute either. This Court has ruled that the right to an unbiased judge is not lost in situations in which the judge's opinion is affirmed by a court of appeals. *See Bracy v. Gramley*, No. 96-6133, __ U.S. __, 1997 WL 303400, *4 n. 6, (June 9, 1997); *e.g., Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). The same should be true in cases involving questions of judicial competence.

The case at issue resembles in many ways the recently decided *Bracy* case. There, the court below denied the petitioner's motion for post-judgment discovery into the possibility of bias on the part of the judge, finding his due process claim "speculative" and concluding that he had failed to show "good cause" justifying discovery. *Bracy v. Gramley*, 81 F.3d 684, 690 (7th Cir. 1996).

The court below also took comfort in the fact that the state supreme court "did not find any errors in the rulings." *Id.* Those findings were not sufficient to obscure the importance of the due process question of the right to a fair judge. The efforts of the United States here should be similarly unavailing.

II.

THE BRIEF IN OPPOSITION OF THE TRIBAL RESPONDENTS FAILS TO DIMINISH THE IMPORTANCE OF THE QUESTION PRESENTED BY THE THREE TRIBES.

The brief in opposition submitted by the Tribal respondents largely focuses on the merits of the case, as opposed to the importance of the question presented. To the limited extent they do focus on the importance of the question presented for review, they offer nothing more than what the United States did in its brief. For the reasons discussed above, they fail to persuade.

CONCLUSION

At stake here are the treaty rights of the Three Tribes and the prospect that they will be forever barred from exercising those rights by a judge who may have been mentally incompetent at the time he rendered his judgment. This case squarely raises the question of the right to a competent trier of fact. For the reasons set forth above and in their Petition, the Three Tribes respectfully request that their Petition for Writ of Certiorari be granted.

Respectfully submitted

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